In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-144

MATSUSHITA ELECTRIC CORPORATION OF AMERICA,
Petitioner,

v.

CITY OF FARMERS BRANCH, TEXAS AND T. E. WALDRIP,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents, the CITY OF FARMERS BRANCH AND T. E. WALDRIP, its Tax Assessor-Collector (hereinafter sometimes jointly referred to as "the respondent"), respectively pray that a writ of certiorari not be issued to review the judgment of the Texas Supreme Court entered in this proceeding on May 5, 1976.

RESPONDENT'S POSITION

1. This Court does not have jurisdiction under 28 U.S.C. § 1257(3) to decide the issue of the prospective or retroactive application of *Michelin Tire Corporation v. Wages*, 423 U.S. 376, 96 S. Ct. 184 (1976) in the case at bar.

2. This case does not present this Court with factual or legal issues which are novel and unique and therefore appropriate for review by this Court by writ of certiorari for the following reasons:

(a) The issues presented in this case have been decided by this Court in *Michelin*.

(b) This case does not indicate a lack of uniform standards in applying this Court's decision in *Michelin* nor the use of conflicting standards by state courts in determining prospective limitation.

(c) Whether or not the standards for prospective limitation stated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) are mandatory upon state courts, those standards would not require such limited treatment in this case.

STATEMENT OF THE CASE

The petitioner has omitted several facts from its Statement of the Case which we believe to be relevant.

The respondent had always denied the exemption claimed by the petitioner from ad valorem tax levied on its imported items stored in its Farmers Branch warehouse. January 1, 1972 was the first assessment date that the petitioner was subject to municipal taxation by the respondent. This is not a case where the respondent is attempting to assess back taxes based upon this Court's decision in *Michelin*, as intimated in the petitioner's brief. (Pet., p. 7.) There was no change in the respondent's position or policy concerning the taxability of these imported items.

The exemption claimed by Matsushita Electric Corporation of America (hereinafter sometimes referred to as "Matsushita") fo each subsequent year has been disallowed and Farmers Branch has included the imported items on its tax rolls for each year. The petitioner and the respondent entered into an agreement to delay the collection of the taxes, pending the outcome in this case.

Farmers Branch, from the inception of this litigation, has always raised as one of its specifically stated arguments that *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872) (expressly overruled by *Michelin*) was wrongly decided.[1] The respondent claimed alternatively that the imports were subject to municipal taxation either because the "original package" they were transported in had been broken [taxable under *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827)], or because they had been incorporated into the mass of goods in our economy by certain acts of the petitioner [taxable under *Youngstown Sheet and Tube v. Bowers*, 358 U.S. 534 (1959)]. The taxing authority in *Michelin*, Gwinnett County, Georgia, unlike Farmers Branch, had not argued or briefed the basis of that ultimate decision. This Court, nevertheless, held that a non-discriminatory ad valorem tax upon imports no longer in the process of importation was not an "impost" or "duty" within the meaning of the Import-Export Clause.

This Court was presented with an opportunity to decide the exact issue raised by the petitioner in its petition for writ of certiorari. Michelin, in its motion for rehearing, argued that the decision should be given only prospective effect. This Court denied that motion for rehearing.

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[1] As stated by the Supreme Court of Texas, "Matsushita was plainly informed and put on notice by the City of Farmers Branch that the city considered that the goods were taxable, and that *Low v. Austin* and similar cases were wrongly decided. There is no basis for a contention that Matsushita relied on any previous action or non-action of the city because the city assessed the Matsushita property for taxes at its first opportunity." (Pet., p. A-9.)

THE WRIT OF CERTIORARI SHOULD NOT BE ISSUED

The respondent respectively prays that a writ of certiorari not issue on any or all of the following grounds:

I. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF TEXAS CONCERNING THE RETROACTIVE APPLICATION OF THE MICHELIN DECISION IN THE CASE AT BAR.

The petitioner attempts to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3), which delimits the Court's certiorari jurisdiction over the judgments of state courts. Since there is no question in the present case concerning the validity of any statute, petitioner predicates jurisdiction on the clause granting certiorari jurisdiction "where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of * * * the United States."[2] Petitioner cites the Import-Export Clause of the United States Constitution, Article 1, Section 10, Clause 2, under the heading "CONSTITUTIONAL PROVISION INVOLVED." Its apparent position is that jurisdiction is predicated on the existence of a constitutional question. The present case, however, does not involve a constitutional issue. The questions presented by the petitioner deals solely with the concept of prospective versus retroactive application of an interpretation of the Import-Export Clause. Though that interpretation is of constitutional origin, the interpretation itself and thus any constitutional question is no longer at issue.

[2] The language of 28 U.S.C. §1257(3) should be compared to the language of 28 U.S.C. §1254 which grants power to this Court to review, by writ of certiorari, the decision of a federal court of appeals. Cases in the court of appeals "may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted upon the petition of any party to *any civil or criminal case*, before or after rendition of judgment or decree . . . ." (emphasis added) The Court may review *any case* and is not limited to cases involving a right, privilege or immunity predicated on the Constitution or a federal statute.

In the benchmark case of *Great Northern R.R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), the Court held that a state court could refuse to give retroactive effect to a decision overruling a previous decision. Justice Cardozo opened the decision by stating, "we think the federal constitution has no voice upon the subject", 287 U.S. 358 at 364, and "we are not at liberty, by anything in the Constitution of the United States, to thrust upon those [state] courts a different conception either of the binding force of precedent or of the meaning of the judicial process." 287 U.S. 358 at 366.

This Court should follow the *Sunburst* reasoning in denying certiorari for a lack of a constitutional question. Whether the courts of the different states allow a municipal or state tax to be assessed retroactively or only prospectively is a matter that is peculiarly within the jurisdiction of those courts. This is the type of issue that Section 1257(3) was meant to restrict from the purview of this Court.

II. THIS CASE DOES NOT PRESENT THIS COURT WITH FACTUAL OR LEGAL ISSUES WHICH ARE NOVEL AND UNIQUE AND THEREFORE APPROPRIATE FOR REVIEW BY THIS COURT BY WRIT OF CERTIORARI.

Notwithstanding petitioner's argument that this Court should review the decision of the Texas Supreme Court to avoid *potential confusion* over the application of *Michelin* (Pet., p. 7), the petition should be denied on the following grounds. First, the issues presented in this case have been considered and decided by this Court in *Michelin*. The respondent's position is identical to that of Gwinnett County, Georgia, and therefore, it should be treated by the courts of law in exactly the same way. Secondly, this case does not indicate a lack of uniform standards in applying this Court's decision in *Michelin*, nor the use of conflicting standards by state courts in determining prospective limitation. To grant certiorari to consider these questions would be to anticipate problems and issues which have not yet arisen, and may not. Finally, even if the *Chevron* guide-

lines are to be mandatorily applied by every state court, the Texas Supreme Court applied these standards correctly in deciding that applying *Michelin* retroactively to the case at bar would not work "harsh or inequitable results."

A. The Issues Presented In This Case Have Been Decided By This Court In Michelin.

The facts of the case at bar are identical to those presented in *Michelin*. In both cases, respondents assessed taxes on imported goods for 1972 and 1973. The importers sought declaratory and injunctive relief in their respective state courts. The sole difference is that Georgia, unlike Texas, has no intermediate appellate court. Consequently, the instant case was still in the state appellate courts when this Court decided *Michelin* and overruled *Low v. Austin*.

The decision in *Michelin* described the purposes which motivated the framers to add the Import-Export Clause to the Constitution. The framers wanted: (1) consistent regulation of commercial relations with foreign nations; (2) a source of revenue for the federal government; and (3) promotion of harmony among the states. This Court decided in *Michelin* that a non-discriminatory ad valorem tax levied upon imports, which have come to rest, would not contravene these specific goals.

Mr. Justice Brennan, speaking for the unanimous court, held that an importer should bear a share of the cost of police and fire protection, along with competitors handling only domestic goods. (96 S. Ct. 535 at 541.) It is undisputed that Matsushita has received the benefit of municipal services provided by Farmers Branch. It is also undisputed that Matsushita's competitors have paid their proportionate share of these costs. *Michelin* is liable for these taxes. Petitioner should also be liable for the taxes due and owing for the years in which it received these services.

The *Michelin* decision terminated the erroneous preferential treatment given to imports since the decision of *Low v. Austin*. Petitioner is asking this Court to extend this erroneous preferential treatment for an additional five years. Indeed, in this case, such a conclusion would entirely defeat the decision of the Texas Courts, since the Texas Supreme Court specifically held that "the reasons for the collectibility of the non-discriminatory tax as to Matsushita for the years in question are prominent in the *Michelin* decision." (Pet., p. A-5.)

The ultimate decision in *Michelin* was that the taxes imposed by Gwinnett County for 1972 and 1973 were fully collectable. This Court did not specifically reserve the question of the retroactive-prospective effect of *Michelin*. Nor did this Court grant *Michelin's* motion for rehearing, which was limited solely to the question of whether the decision should be applied prospectively. Therefore, the taxes assessed by the respondent in the same years should likewise be collectable.

B. This Case Does Not Indicate A Lack Of Uniform Standards In Applying This Court's Decision In Michelin Nor The Use Of Conflicting Standards By State Courts In Determining Prospective Limitation.

Despite Matsushita's argument that this case presents broad and significant issues since importers "are faced with *the possibility* of state courts applying different standards of retroactivity, depending upon applicable periods of limitations in each state" (Pet., p. 7, *emphasis added*), Matsushita cannot point to actual cases or controversies where state courts have applied different standards of retroactivity. It is well-settled that as a prerequisite to certiorari review by this Court, the petitioner must assert its own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties. *See Worth v. Selden*, 955 Ct. 2197 (1975). A claim of *potential abuses* against *other importers* should not support a grant of a writ of certiorari in the case at bar.

It is true that in a footnote, Matsushita refers to the difference in effect given *Michelin* by a California state court, and that given the decision by the Ohio Tax Commis-

sioner. (Pet., p. 7 f/n 6.) However, the Ohio decision (to apply *Michelin* prospectively in cases where taxing authorities *had granted prior exemptions*) was made by an administrative agency and not a court of law. It does not represent a lack of uniform standards exercised by state courts in applying this Court's decision in *Michelin*. Furthermore, the administrative release does not even apply specifically to situations where taxing authorities *had actually assessed* and attempted to collect taxes on imports prior to the *Michelin* decision. That, of course, is the situation as it exists here.

Matsushita argues that because state statutes of limitations for reassessment by taxing authorities differ, it indicates a lack of uniform standards among the state courts in applying *Michelin*. (Pet., p. 7.) The fallacy of this argument is evident. Merely the fact that Texas allows reassessment for a period of four years [Tex. Rev. Civ. Stat. Ann., art 7298 (1960)] and Georgia allows reassessment for seven years [Ga. Code Ann., § 92-770 (1974)], does not represent a judicial conflict in applying *Michelin*. *Rather, these are* differences in state policy established by the legislature of those states. Matsushita has not cited a case where a state court has decided, contrary to the decision of the Texas Supreme Court in this case, that harsh and inequitable results would follow from the application of *Michelin* without limitation.

Finally, Matsushita misconstrues the mandate of this Court when dealing with the question of prospective limitation of an overruling decision. This Court in numerous cases has stated that *equitable considerations*, rather than stringent standards, viewed in light of the facts and circumstances in the case at bar, control the decision whether to apply the overruling decision prospectively. *See e.g. Bradley v. School Board of Richmond*, 416 U.S. 696 (1974). Matsushita has cited no case where a federal or state court in making the prospective-retroactive decision did not apply equitable standards. The Supreme Court of Texas in the case at bar

specifically considered Matsushita's arguments that it was inequitable to apply *Michelin* to this case and emphatically rejected them. (Pet., p. A-5.)

Viewed in its strongest light, the most that can be said of Matsushita's argument is that they anticipate a potential conflict between decisions of state courts. However, respondent submits that if such a conflict does arise in the future, it would arise from differing factual determinations concerning the prior activities of importers and taxing authorities, rather than the application by state courts of conflicting legal principles and standards.

This Court should not anticipate cases and controversies which are not presented by the facts of the case at bar. If and when any of these "fears" of the petitioner materializes into genuine litigation, this Court should then rule of the merits of those issues. *Allen-Bradley Local No. 1111, et al v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942).

III. THE TEXAS SUPREME COURT CORRECTLY APPLIED THE STANDARDS OUTLINED IN CHEVRON.

The *Chevron* guidelines have never been considered mandatory, as argued by the petitioner,[3] but only as considerations in those cases where retroactive application of a changed law or decision would work harsh and inequitable results.

But certainly this is not the case in which to test that issue, since the Supreme Court of Texas referred to these principles, and decided that *Michelin* should be applied without limitation.

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[3] The Court itself in *Chevron* merely said that these principles *may* be looked to by courts in attempting to weigh the equities. 404 U.S. at 107. *See also Lemon v. Kurtzman*, 411 U.S. 192 (1973) [where this Court stated that the *Chevron* guidelines are helpful but are discretionary with each court]. Moreover, the Court in *Chevron* merely applied the procedural law dealing with the issue in question prospectively, but expressly held that in regard to the substantive matters in question, the overruling decision was to be applied retroactively. 404 U.S. at 108 f/n 10.

Even if we liberally apply the *Chevron* general guidelines to our facts, it is evident that the inequitable results that might result from retroactive application of an overruling decision, are not evident in this case. The *Chevron* factors would support petitioner's obligation to pay its taxes for 1972 and 1973.

A. The Decision Must Reverse "Clear Past Precedent" On Which The Litigants May Have Relied.

Michelin overruled *Low v. Austin*, but that decision had already been tainted by this Court's decision in *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534 (1959) as well as questioned in numerous state court actions. *See e.g. Volkswagen Pacific, Inc. v. City of Los Angeles*, 101 Cal. Rptr. 869, 496 P. 2d 1237 (1972). Matsushita's right to rely on *Low v. Austin* in 1972 must, therefore, be considered less than absolute.

Also, there is no indication that petitioner relied on prior precedent other than counsel's assertions that pricing was affected. We could as easily assert that competition, and not costs, dictated pricing practices.

No amount of petitioner's optimism as to the outcome of its suit against respondent can be deemed to constitute "reliance". For each and every year, the petitioner has been aware of the precise amount of tax which would be due if it failed in its injunction suit against the respondent. This is not a case where the petitioner has relied upon inconsistent past actions of the respondent. *See e.g. Oklahoma County v. Queens City Lodge*, 195 Okla. 131, 156 P.2d 340 (1945) [involving a taxing authority which had assumed the exempt status of a charity for years prior to the suit]. This is not a case where both litigants relied upon an erroneous decision. *See e.g. Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) [involving a statute of limitations that both parties assumed to be law].

The case at bar is clearly distinguishable from the decision in *Lemon v. Kurtzman*, 411 U.S. 192 (1973), which is cited

by the petitioner for the proposition that reliance upon statutory schemes even if constitutionally suspect from its very inception is justified. (Pet., p. 9.) *Kurtzman* presented the question of whether repayments should be made to the state for funds expended under a state law for the benefit of non-public schools, prior to the date that such law was declared unconstitutional. This Court held that the decision declaring the state law unconstitutional should be applied only prospectively, since the parties who claimed that the statute was unconstitutional had either abandoned or not sought repayments prior to the Supreme Court's decision. In the case at bar, there is not a "reaching back" to secure relief, since the tax was assessed in the very first year in which Matsushita became subject to the municipal tax.

From the inception of this lawsuit, Farmers Branch asserted three distinct theories upon which the imports could have been taxable. The respondent did not rely solely on the chance that this Court would overrule *Low v. Austin*. This Court held in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974) that the existence of various theories on which a party may have lost vitiates his claim of "manifest injustice" when one of those theories is sustained by virtue of a change in the law.

B. The Prior History Of The Rule, Its Purpose And Effect Must Indicate That Retrospective Operation Would Retard Its Operation.

The history of the Import-Export Clause indicates three reasons why it was added to the Constitution. Applying the decision in *Michelin* without limitation to the case at bar will certainly not retard the (1) consistent regulation of commercial relations with foreign nations, (2) source of revenue for the federal government, or (3) harmony among the states.

The primary purpose of the *Michelin* decision was not to require ultimate consumers to "pay for local governmental services funded by ad valorem property taxes on

goods". (Pet., p. 9.) The primary purpose of the decision was to force the importer to bear its share of the costs of municipal services and to terminate the preferential treatment afforded importers since *Low v. Austin*. 96 S. Ct. 535 at 541.[1] The Court in *Michelin* stated in a footnote that "depending on the relevant competition from domestic goods, an importer may be forced to absorb some of these ad valorem property assessments rather than passing them on to consumers." 96 S. Ct. 535 at 542, f/n 8. Thus, retroactive application of *Michelin* will not retard the operation of the *Michelin* decision or the goals of the Import-Export Clause.

C. Applying The New Rule Retroactively Must Produce Substantial Injustice Or Hardship In The Case At Bar.

Petitioner argues as the heart of its argument that to apply *Michelin* retroactively would be to "reach back now and disturb legal relationships [which] would not further the purpose of *Michelin* because it would penalize those who relied upon *Low*, allow local municipalities to recap a windfall in added revenues without concomitant increase in expenses of local services, and not affect * * * the ultimate consumer." (Pet., p. 9.)

The petitioner's position seems to be that any taxes imposed upon importers should be paid by the consumers or not at all. This contention is neither reasonable nor logical. Perhaps, the petitioner is saying that it would have raised its prices, without regard to the competitive pricing of domestic wholesalers, if it had to pay taxes as did those domestic wholesalers. If that is the case, petitioner's ultimate complaint is that its domestic tax burden will result

[1] The Supreme Court of Texas noted that "Matsushita's property during such period was afforded the same public services, including police and fire protection, as were afforded to their competitors and to others in the community; and there is *no great inequity* in their having to bear the same fair and equal share of such expense; i.e., the non-discriminatory taxes assessed during such period." (Pet., p. A-5, *emphasis added.*)

in a reduction of its profits. If this is, in fact, the ultimate basis of the petitioner's inequitable argument, it should be rejected.

Actually, inequity will result to Farmers Branch if the *Michelin* decision is limited by this Court. Farmers Branch has been in litigation for just as long as the taxing authority in *Michelin*. Farmers Branch has placed these imports on its tax rolls and budgeted its municipal activities and services relying on the collection of these amounts.

IV. CONCLUSION.

For any and all of these reasons, a writ of certiorari should not issue to review the judgment and opinion of the Texas Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ronald M. Mankoff, do hereby certify that a true and correct copy of the foregoing Respondent's Brief In Opposition To Petition For Writ of Certiorari was served on the Petitioner by hand delivering a copy thereof to its attorney of record, Jerry Buchmeyer, 2300 Republic National Bank Building, Dallas, Texas 75201, this 27th day of August, 1976.

Ronald M. Mankoff

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